

LAW NOTE FOR TRIAL JUDGES**2400 MISREPRESENTATION: BASES FOR LIABILITY AND DAMAGES**

Wisconsin recognizes three common law categories of misrepresentation: intentional, strict responsibility, and negligent misrepresentation. All three require that the defendant made an untrue representation of fact and that the plaintiff relied upon the representation. Intentional misrepresentation additionally requires that the defendant knowingly or recklessly made the untrue representation with the intent to deceive the plaintiff. Strict responsibility misrepresentation does not require a showing of an intent to deceive, rather the plaintiff must only show that the defendant had an economic interest in the transaction and made the representation on the defendant's personal knowledge under circumstances in which the defendant necessarily ought to have known the truth or untruth of the statement.¹ Negligent misrepresentation differs from intentional and strict responsibility misrepresentation in the circumstances and quality of the representation of fact. Under negligent misrepresentation, the untrue statement of fact need only be "negligently" made rather than intentional and the speaker does not require an economic interest in making the representation.

Intentional Misrepresentation

The elements of intentional misrepresentation are: (1) the defendant made a representation of fact; (2) the representation was untrue; (3) the defendant made the representation either knowing that it was untrue, or recklessly not caring whether it was

true or false; (4) the defendant made the representation with the intent to deceive the plaintiff in order to induce the plaintiff to act to plaintiff's pecuniary damage; and (5) the plaintiff believed that the representation was true and relied on it.² The plaintiff's reliance on the representation must be justifiable.³

Strict Responsibility Misrepresentation

The elements of strict responsibility misrepresentation are: (1) the defendant made a representation of fact; (2) the representation was untrue; (3) the defendant made the representation based on his or her personal knowledge, or was so situated that he or she necessarily ought to have known the truth or untruth of the statement; (4) the defendant had an economic interest in the transaction; and (5) the plaintiff believed that the representation was true and relied on it.⁴ The plaintiff's reliance on the representation must be justifiable.⁵

Strict responsibility applies to those situations where public opinion calls for placing the loss on the innocent defendant rather than on the innocent plaintiff and requires the presence of two factors before liability may be found: (1) "a representation made as of defendant's own knowledge, concerning a matter about which he or she purports to have knowledge, so that he or she may be taken to have assumed responsibility as in the case of warranty, and (2) a defendant with an economic interest in the transaction into which the plaintiff enters so that defendant expects to gain some economic benefit."⁶ The policy behind strict responsibility misrepresentation is that the speaker should know the pertinent

facts of which he or she is speaking or else the speaker should not speak.⁷

The doctrine of strict responsibility misrepresentation has primarily been utilized in cases involving property transactions,⁸ such as where there has been a representation as to the identification, boundaries, quantity and quality of the land, and existence of certain improvements upon the land, all of which were untrue. As discussed below, the creation of the economic loss doctrine (ELD) in 1989 has greatly impacted common-law claims involving property transactions.

Negligent Misrepresentation

The elements of negligent misrepresentation are: (1) the defendant made a representation of fact; (2) the representation was untrue; (3) the defendant was negligent in making the representation; and (4) the plaintiff believed that the representation was true and relied on it.⁹ Negligence for misrepresentation, like other actions for negligence, requires a duty of care, or a voluntary assumption of duty.

Measurement of Damages

Wisconsin has adopted the “benefit-of-the-bargain” measure of damages for intentional¹⁰ and strict responsibility¹¹ claims. The “benefit-of-the-bargain” gives the difference between the fair market value of the property in the condition when purchased and the fair market value of the property as it was represented.¹² The “out-of-pocket” rule, which gives the difference between what the plaintiff gave as consideration and what the plaintiff actually received, is utilized in cases of negligent misrepresentation.¹³

Economic Loss Doctrine

In 1989, the Supreme Court established the ELD, which requires transacting parties in Wisconsin to pursue only their contractual remedies when asserting an economic loss claim.¹⁴ Its purpose is threefold: (1) to “maintain the fundamental distinction between tort and contract law;” (2) to “protect[] . . . ‘parties’ freedom to allocate economic risk by contract;” and (3) to “encourage[] ‘the party best situated to assess the risk [of] economic loss, the . . . purchaser, to assume, allocate, or insure against that risk.’”¹⁵

The ELD bars negligence and strict liability claims arising from consumer goods transactions.¹⁶ The Supreme Court also has considered whether the ELD bars common law claims for intentional misrepresentation that occur “in the context of residential or noncommercial, real estate transactions.”¹⁷ The court concluded that, whether a buyer is a “commercial” or “residential” buyer, the ELD still bars the intentional misrepresentation claim.¹⁸

The Supreme Court has noted in other cases that the ELD does not apply if the contract was for a “service[]” rather than a “product.”¹⁹ Nor does the ELD apply to statutory claims, such as false advertising claims under Wis. Stat. § 100.18 or fraudulent misrepresentation claims under Wis. Stat. § 895.446.²⁰ One may recover “pecuniary” damages, costs, and reasonable attorney fees upon proof of a § 100.18 violation and “actual damages,” all costs of litigation, and exemplary damages upon proof of a § 895.446 violation.²¹

The Supreme Court has recognized exceptions to the ELD.²² First, the ELD “does not

bar a commercial purchaser's claims based on personal injury."²³ Second, the ELD "does not bar . . . claims based on . . . damage to property other than the product, or economic claims that are alleged in combination with noneconomic losses."²⁴ Third, the court has recognized a so-called "fraud in the inducement" exception.²⁵

Regarding the first and second exceptions, the ELD merely bars "the recovery of purely economic losses . . . through tort remedies where the only damage is to the product purchased by the consumer."²⁶ So damage to a person or "other property" is not barred by the ELD.²⁷

The Supreme Court has established a "two part test" to determine whether the other property exception applies.²⁸ First, if the "defective product and the damaged product are part of an 'integrated system' " the exception does not apply.²⁹ "If the product and damaged property are part of such a system, then any damage to that property is considered to be damage to the product itself."³⁰ Stated otherwise, "once a part becomes integrated into a completed product or system, the entire product or system ceases to be 'other property' for purposes of the economic loss doctrine."³¹ So if the defective product is a "component of an integrated system," damage to the integrated system is non- compensable.³² Examples of components in integrated systems include: (1) "cement in a concrete paving block;" (2) "a window in house;" (3) "a gear in a printing press," (4) "a generator connected to a turbine;" and (5) "a drive system in a helicopter."³³ Second, "[i]f the damaged property and the defective product are not part of an integrated system" courts apply the

“disappointed expectations” test.³⁴ The crux of the test is “whether the purchaser should have foreseen that the product could cause the damage at issue. When claimed damages are merely the result of disappointed expectations of a product’s performance, the exception will not apply and the economic loss doctrine will bar recovery in tort.”³⁵

In 2003, the Supreme Court adopted a “narrow” fraud in the inducement exception to the ELD to promote “honesty, good faith and fair dealing during contract negotiations.”³⁶ The exception applies if the plaintiff establishes three elements: (1) “that the defendant engaged in an intentional misrepresentation;” (2) “that the misrepresentation occurred before the contract was formed;” and (3) “that the alleged misrepresentation was extraneous to the contract.”³⁷ To state the third element differently, the misrepresentation must be “extraneous to, rather than interwoven with, the contract;”³⁸ the misrepresentation “must ‘concern[] matters whose risk and responsibility did not relate to the quality or the characteristics of the goods for which the parties contracted or otherwise involved performance of the contract.’”³⁹

Verdict

The verdict should be presented in alternatives if the evidence would permit findings on more than one of the three theories. The instructions on damages must indicate clearly to the jury which measure of damages to apply in connection with each finding.

NOTES:

1. Van Lare v. Vogt, Inc., 2004 WI 110, ¶32, 274 Wis. 2d 631, 683 N.W.2d 46.

2. Malzewski v. Rapkin, 2006 WI App 183, ¶17, 296 Wis. 2d 98, 723 N.W.2d 156
3. Id., ¶18. In Malzewski, the buyers waived their right to inspect the home despite the real estate condition report disclosing potential defects. The court found that the Malzewskis' reliance on the condition report was not justified to support a claim for intentional misrepresentation. Id.
4. Id., ¶19.
5. Id., ¶19.
6. Gauerke v. Rozga, 112 Wis. 2d 271, 280, 332 N.W.2d 804 (1983); see also Stevenson v. Barwineck, 8 Wis. 2d 557, 99 N.W.2d 690 (1959).
7. Reda v. Sincaban, 145 Wis. 2d 266, 426 N.W.2d 100 (Ct. App. 1988).
8. Gauerke, 112 Wis. 2d 271; Harweger v. Wilcox, 16 Wis.2d 526, 114 N.W.2d 818 (1962); Neas v. Siemens, 10 Wis.2d 47, 102 N.W.2d 259 (1960); Lee v. Bielefeld, 176 Wis. 225, 186 N.W. 587 (1922); Ohrmundt v. Spiegelhoff, 175 Wis. 214, 184 N.W. 692 (1921); First Nat'l Bank v. Hackett, 159 Wis. 113, 149 N.W. 703 (1914); Arnold v. National Bank of Waupaca, 126 Wis. 362, 105 N.W. 828 (1905); Matteson v. Rice, 116 Wis. 328, 92 N.W. 1109 (1903); Davis v. Nuzum, 72 Wis. 439, 40 N.W. 497 (1888); Bird v. Kleiner, 41 Wis. 134 (1876).
9. Malzewski, 296 Wis. 2d 98, ¶20. A claim based on "negligent misrepresentation inquires whether the buyer was negligent in relying upon the representation." Lambert v. Hein, 218 Wis. 2d 712, 731, 582 N.W.2d 84 (Ct. App. 1998). See also, Beuttler v. Marquardt Management Services, Inc., 2022 WI App 33, 404 Wis.2d 116, ¶30, 978 N.W.2d 237 concerning the use of circumstantial evidence used to establish actual reliance upon the representation.
10. Anderson v. Tri State Home Improvement Co., 268 Wis. 455, 67 N.W.2d 853 (1954); Chapman v. Zakzaska, 273 Wis. 64, 76 N.W.2d 537 (1956).
11. Harweger v. Wilcox, 16 Wis.2d 526, 114 N.W.2d 818 (1962); Neas, 10 Wis.2d 47; Anderson v. Tri State Home Improvement Co., 268 Wis. 455.
12. See WIS JI-CIVIL 2405.
13. Gyldenvand v. Schroeder, 90 Wis. 2d 690, 280 N.W.2d 235 (1979).
14. Hinrichs v. DOW Chemical Co., 2020 WI 2, ¶29, 389 Wis. 2d 669, 937 N.W.2d 37 (citing Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc., 148 Wis. 2d 910, 437 N.W.2d 213 (1989)).
15. Id., ¶29 (quoting Van Lare v. Vogt, Inc., 2004 WI 110, ¶17, 274 Wis. 2d 631, 683 N.W.2d 46) (third modification in the original).
16. State Farm Mutl. Auto Ins. V. Ford Motor Co., 225 Wis. 2d 305, 592 N.W.2d 201 (1999).
17. Below v. Norton, 2008 WI 77, ¶20, 310 Wis. 2d 713, 751 N.W.2d 351 (2008).

18. Id., ¶23.
19. See 1325 N. Van Buren, LLC v. T-3 Grp., Ltd., 2006 WI 94, 293 Wis. 2d 410, 716 N.W.2d 822; Linden v. Cascade Stone Co., 2005 WI 113, 283 Wis. 2d 60, 699 N.W.2d 189; Ins. Co. of N. Am. v. Cease Elec. Inc., 2004 WI 139, 276 Wis. 2d 361, 688 N.W.2d 462.
20. Hinrichs, 389 Wis. 2d 669, ¶55; Ferris v. Location 3 Corp., 2011 WI App 134, ¶12, 337 Wis. 2d 155, 804 N.W.2d 822.
21. See Wis JI-Civil 2418 & 2419.
22. Hinrichs, 389 Wis. 2d 669, ¶32 (citing John J. Laubmeier, Demystifying Wisconsin's Economic Loss Doctrine, 2005 Wis. L. Rev. 225, 228).
23. Id., ¶40 (quoting Daanen & Janssen, Inc. v. Cedarapids, Inc., 216 Wis. 2d 395, 402, 573 N.W.2d 842 (1998)).
24. Id., (quoting Daanen & Janssen, Inc., 216 Wis. 2d at 402).
25. See generally Id.
26. Hinrichs, 389 Wis. 2d 669, ¶40 (quoting State Farm Fire & Cas. Co. v. Hague Quality Water, Int'l, 2013 WI App 10, ¶6, 345 Wis. 2d 741, 826 N.W.2d 412).
27. Id., ¶40–41.
28. Id.
29. Id.
30. Id.
31. Id. (quoting Selzer v. Brunzell Bros., Ltd., 2002 WI App 232, ¶38, 257 Wis. 2d 809, 652 N.W.2d 806).
32. Id., ¶46.
33. Id.
34. Id., ¶41.
35. Id.
36. Digicorp, Inc. v. Ameritech Corp., 2003 WI 54, ¶34, 262 Wis. 2d 32, 662 N.W.2d 652.
37. Hinrichs, 389 Wis. 2d 669, ¶35.
38. Id., ¶35 (quoting Kaloti Enterprises v. Kellogg Sales Co., 2005 WI 111, ¶42, 283 Wis. 2d 555,

699 N.W.2d 205).

39. Id. (quoting Kaloti, 283 Wis. 2d 555, ¶42) (modifications in the original).

COMMENT

This Law Note was approved in 2018. The comment was revised in 2021. This revision was approved by the Committee in September 2022; it added to the notes.